Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-431

THEODORE L. SENDAK,
Attorney General of Indiana,

Appellant,

vs.

ROBERT D. ARNOLD, M.D.,
H. C. MOSS, M.D.,
NEIL R. STRICKLAND, M.D.,
IRVING ROSENBAUM, M.D.,
PAUL L. GUISE, M.D.,
WALTER L. OWENS, M.D.,

Appellees.

Appeal From The United States District Court
For The Southern District of Indiana
Indianapolis Division

JUDISDICTIONAL STATEMENT

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Assistant Attorney General

Attorneys for Appellant

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4725

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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Appellees.

JUDISDICTIONAL STATEMENT

Appellant Theodore L. Sendak, in his capacity as Attorney General of Indiana, appeals from the Memorandum of Decision and Judgment of the United States District Court for the Southern District of Indiana, sitting as a three-judge court pursuant to 28 U.S.C. § 2284, declaring unconstitutional and enjoining the enforcement of, an Indiana statutory requirement that abortions during the first trimester of pregnancy be performed in a hospital or a licensed health facility.

OPINION BELOW

The Memorandum of Decision and Judgment of the District Court have not been reported. They are set forth in the appendix hereto.

JURISDICTION

This appeal is taken from a final Judgment of the United States District Court for the Southern District of Indiana, sitting as a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. That Judgment granted a declaratory judgment that the Indiana statute is unconstitutional and void and a permanent injunction against the enforcement of that statute. The Complaint in the action alleged jurisdiction under the Constitution of the United States, 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281, 2284 and 42 U.S.C. § 1983.

The District Court's Memorandum of Decision and Judgment were dated and entered on June 15, 1976. Appellant Sendak filed his Notice of Appeal in the United States District Court for the Southern District of Indiana, Indianapolis Division, on August 11, 1976, pursuant to 28 U.S.C. § 2101(b). That Notice of Appeal is set forth in the appendix hereto.

The basis of the jurisdiction of this Court over this appeal is 28 U.S.C. § 1253, as sustained by the case of *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

The statute involved is Indiana Code (I.C.) 35-1-58.5-2 (a)(1), which is as follows:

> "Abortion shall in all instances be a criminal act except when performed under the following circumstances:

> (a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> (1) It is performed by such physician in a hospital, or a licensed health facility as defined in I.C. 1971, 16-10-2 which offers the basic safeguards as provided by a hospital admission, and has immediate hospital back-up; . . ."

QUESTIONS PRESENTED ON APPEAL

1. Whether there was a proper basis for the entry of summary judgment in that there was no showing by affidavit or admission of any fact.

2. Whether a restriction on the place of performing an abortion in the first trimester of pregnancy, which restriction has never been found to be unreasonable, is unconstitutional *per se*.

STATEMENT OF THE CASE

This action was instituted on January 2, 1974, by the filing of a non-verified Complaint for Declaratory Judgment and Injunctive Relief, alleging that I.C. 35-1-58.5-2 (a)(1) is unconstitutional. A three-judge court was convened. On February 27, 1974, a Motion to Dismiss was filed. On December 23, 1974, plaintiffs filed a Motion for Summary Judgment. A Memorandum in Opposition to Motion for Summary Judgment was filed on February 11, 1975. The District Court's Memorandum of Decision of June 15, 1976, overruled the Motion to Dismiss and sustained the Motion for Summary Judgment.

There are no relevant facts present in this case. The issue was decided solely upon the language of the statutory provision involved.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

ENTRY OF SUMMARY JUDGMENT WAS IMPROPER

The first matter presented here is whether the District Court's granting of summary judgment was procedurally correct. This question rests upon the language of Federal Rules of Civil Procedure, Rule 56(c), which is, in relevant part, as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

How, then, must the moving party "show" the presence of such uncontested facts as would provide the basis for summary judgment? A leading authority has given the answer as follows:

> "The movant must sustain his burden of showing that there is no genuine issue of material fact by facts of which the court will take judicial notice; and by evidentiary materials which the court is entitled to consider." 6 Moore's Federal Practice, § 56.15(3) at 56-477 and 478. (Footnotes omitted.)

The District Court took the position that the only element which had to be shown was the content of the Indiana statutory provision, a matter of which courts may obviously take judicial notice. But it is asserted here, and was asserted in the Memorandum in Opposition to Motion for Summary Judgment in the District Court, that more than an abstract issue of law must be presented by a plaintiff to entitle him to a judgment; in addition, there must be

the showing of standing to bring the action and of the presence of a real case or controversy. United States Constitution, Article 3, Section 2; *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972).

Appellant Sendak's Motion to Dismiss in the District Court raised issues of whether the allegations of fact contained in the Complaint, assumed *arguendo* to be true, were sufficient to show standing and the presence of a case or controversy. Those issues are separate and distinct from those raised in regard to the Motion for Summary Judgment. In regard to the latter, the issue is whether those allegations of fact, even assumed *arguendo* to be sufficient, were shown to be true.

A brief summary of those allegations is that each plaintiff is a registered and licensed physician engaged in the practice of medicine in the State of Indiana, which practice includes abortion cases. Each plaintiff claimed to be "hindered, deterred, chilled and threatened" in his practice by the statutory provision.

These allegations are clearly not the type of matter of which a District Court may take judicial notice. Federal Rules of Evidence, Rule 201(b). Nor were they presented "by evidentiary materials which the court is entitled to consider." Moore's Federal Practice, *supra*. The Motion for Summary Judgment was not supported by affidavits, no discovery had been had, no evidence was heard, nor had defendants answered to provide possible admissions of any such allegations. The Complaint was not even verified, assuming verification to be sufficient.

Since essential elements of a right to prevail were presented to the District Court only as bare and unsupported allegations of the Complaint., there was not a proper basis presented for the entry of summary judgment.

The judgment entered in this case without a showing of a case or controversy amounted to a mere advisory opinion which was beyond the jurisdiction of the District Court.

II.

THE DISTRICT COURT ERRED IN HOLDING THE INDIANA STATUTE UNCONSTITUTIONAL

The second argument is that, even had the issue of the constitutionality of the Indiana statute been properly before the District Court for decision, that issue was wrongly decided. The Indiana statute places a reasonable and constitutional limitation on the place of performing an abortion, without having any necessary effect of preventing or prohibiting abortions. The statute requires that such abortion be performed in a hospital or licensed health facility. The latter term, as defined by Indiana law, could apparently include many clinics but would not include merely a physician's office.* Without this restriction, an abortion could legally be performed not only in the physician's office, but also in the back seat of an automobile, in a bedroom of a private residence, or on a downtown street corner at high noon.

The interests of the State of Indiana, under the police power, involve not only the obvious matter of protection of the health of the patient but also the interest of regulation of the practice against fraud. One argument presented to the District Court by appellant Sendak was that states having experience with unregulated abortion practices have had problems with fraudulent practices. It is noted that the concurring opinion of Mr. Justice Stewart in *Planned*

*The specific issue as to the place of performing an abortion considered in *Doe v. Bolton*, 410 U.S. 179(1973) was a requirement that it be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals.

Parenthood of Central Missouri v. Danforth, —— U.S. ——, 96 S.Ct. 2831 at 2851 and fn. 2 (1976), points out one aspect of the special nature of the operation of many abortion clinics.

The District Court took the position, based upon certain language in this Court's opinions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton, supra*, that no state law which in any manner regulates abortions during the first trimester of pregnancy can be constitutional. That analysis would hold such a statute unconstitutional regardless of the reasonableness of the regulation. Thus, the District Court did not give any consideration to the reasonableness of the Indiana statute. Nor was there any evidentiary basis presented to the District Court which would have supported a finding that the statutory restriction on the place of performing the abortion might be unreasonable. It must then be presumed, in reviewing the granting of summary judgment by the District Court, that the statutory restriction is in fact reasonable, since on summary judgment the record before the court is viewed in the light most favorable to the party opposing the motion. See, e.g. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 473 (1962).

This Court found in *Roe* and *Doe, supra*, that a woman has extensive constitutional rights to choose to have her pregnancy aborted.* There would presumably be a derivative right of a physician to perform such promiscuous abortions. The issue thus presented here is whether those rights are so absolute that a state may not place even reasonable

*Appellant Sendak is of the belief that *Roe* and *Doe* were wrongly decided and should be overruled. It is not necessary to this appeal, however, that this broader issue be considered, since the opinion of the District Court should be reversed even under the rule of *Roe* and *Doe*.

sanitary and public health restrictions on the abortion process.

Since the date of the District Court decision, this Court has had occasion to consider the abortion issue further. *Planned Parenthood of Central Missouri v. Danforth, supra; Bellotti v. Baird,* —— U.S. ——, 96 S.Ct. 2857 (1976). Those cases would appear to be controlling here since they uphold the validity of a requirement that the patient give a written and informed consent to the procedure prior to the abortion even in the first trimester of pregnancy. As stated in the *Planned Parenthood* case:

> "It is true that *Doe* and *Roe* clearly establish the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy. Despite the fact that apparently no other Missouri statute, with the exceptions referred to in n. 6, *supra,* requires a patient's prior written consent to a surgical procedure, the imposition by § 3(2) of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.
>
> We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions." 96 S.Ct. at 2840 (Footnotes omitted.)

Bellotti stands for the proposition that, if certain safeguards are provided, consent for an abortion on a juvenile female person may also require consent by some other authority such as a parent or a court.

Thus, state law provisions which place reasonable limitations on the place, manner or procedure of the abortion and on the physician-patient relationship can be upheld. The concurring opinion of Mr. Justice Stewart in the *Planned Parenthood* case makes it clear that the apparently absolute language of *Roe* and *Doe* came "in the context of invalidating a state law aimed at *thwarting* a woman's decision to have an abortion." 96 S.Ct. at 2850, (Emphasis added.) As was stated last term in a First Amendment case:

> "This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case with the stated principle that there may be no restriction whatever on expressive activity because of its content." *Young v. American Mini Theatres, Inc.,* —— U.S. ——, 96 S.Ct. 2440 at 2450 (1976). (Footnote omitted.)

It was noted in the *Young* case that:

> "Reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, e.g. *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93

L.Ed. 513 (limitation on use of sound trucks); *Cox v. State of Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 2d 487 (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of school session)." 96 S.Ct. at 2448, fn. 18.

The First Amendment right of free speech has traditionally been considered one of the highest, if not the highest, right guaranteed by the Constitution. It would be greatly anomalous for the right promiscuously to abort pregnancies, found in the Bill of Rights only inferentially, be accorded a position so much higher than the First Amendment.

CONCLUSION

For the foregoing reasons, Appellant Theodore L. Sendak, in his capacity as Attorney General of Indiana, urges this Court to note probable jurisdiction over this case, set the cause for plenary consideration, and reverse the Judgment of the United States District Court for the Southern District of Indiana.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Assistant Attorney General

Attorneys for Appellant

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT D. ARNOLD, M.D., H. C. MOSS, M.D., NEIL R. STRICKLAND, M.D., IRVING ROSENBAUM, M.D., PAUL L. GUISE, M.D., WALTER L. OWENS, M.D., *Plaintiffs,*	)	
vs.	)	NO. IP 74-4-C
THEODORE L. SENDAK, Attorney General of Indiana, JAMES F. KELLEY, Prosecuting Attorney of Marion County, Indiana, BARRY S. BROWN, Prosecuting Attorney of Monroe County, Indiana, *Defendants.*	)	

MEMORANDUM OF DECISION

The plaintiffs, licensed physicians actively engaged in the practice of medicine in Marion and Monroe Counties, Indiana, have brought this action to declare part of the Indiana abortion statute, I.C. 1971, 35-1-58.5-2(a)(1), unconstitutional and to enjoin its enforcement. The challenged section of the statute provides:

> "Abortion shall in all instances be a criminal act except when performed under the following circumstances:

(a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

(1) It is performed by such physician in a hospital or a licensed health facility as defined in IC 1971, 16-10-2 which offers the basic safeguards as provided by a hospital admission, and has immediate hospital backup. . . ."

Each plaintiff alleges that he is required on a recurring basis to give professional advice and information pertaining to abortion and that he is "hindered, deterred, chilled and threatened and his practice of medicine is seriously impaired by the existence, actual or threatened enforcement, effect, application and impact of the challenged statutory provisions."

The plaintiffs contend that the statutory requirement that all abortions, including those during the first trimester of pregnancy, be performed in a hospital or licensed health facility, directly contravenes the Supreme Court decisions in *Roe v. Wade,* 410 U.S. 113 (1973), and *Doe v. Bolton,* 410 U.S. 179 (1973).

Jurisdiction is invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281, and 2284. A three-judge court was convened pursuant to 28 U.S.C. § 2284 on January 22, 1974. Original defendants Thomas A. Berry and Noble L. Pearcy have been replaced in their former capacities as prosecuting attorneys of Monroe and Marion Counties, Indiana, by Barry S. Brown and James F. Kelley, who pursuant to F.R.Civ.P. 25 (d)(1) are automatically substituted as parties defendant.

The defendants have moved to dismiss the complaint for failure to state a-claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6) and for lack of jurisdiction over the subject matter pursuant to F.R.Civ.P. 12 (b)(1). The plaintiffs have moved for summary judgment pursuant to F.R.Civ.P. 56.

I. Motion to Dismiss

The defendants first contend that this Court should abstain on the ground that the challenged statute is susceptible of a construction by the state courts which would avoid the federal constitutional question, citing *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972). There is no basis for such contention in this case because the statute is unambiguous, and the sole question is whether it is unconstitutional on its face. *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

The defendants next contend that the plaintiffs lack standing to maintain this action, and that no case or controversy exists since plaintiffs do not allege that they have been threatened with prosecution. The Supreme Court rejected similar contentions in *Doe, supra,* 410 U.S. at 188; *accord, Friendship Medical Center, Ltd. v. Chicago Board of Health,* 505 F.2d 1141 (7 Cir. 1974), cert.den. 420 U.S. 955 (1975); *Nyberg v. City of Virginia,* 495 F.2d 1342 (8 Cir. 1974), appeal dismissed and cert.den. 419 U.S. 891 (1974).

The defendant Sendak also contends that the complaint should be dismissed as to him because he is not a proper party.

One of the duties of the Attorney General is set out in I.C. 1971, 4-6-1-6(a) as follows: "[He shall] consult with and advise the several prosecuting attorneys of the state in relation to the duties of their office; and when, in his judgment, the interest of the public requires it, he shall attend the trial of any party accused of crime, and

assist in the prosecution." He therefore has the power, on his own motion, to participate in the trial of criminal cases. He also has the sole power to represent the state in all appellate proceedings in criminal cases. I.C. 1971, 4-6-21; *State v. Market,* 302 N.E.2d 528 (Ind.App. 1973). The Attorney General thus has broad powers in the enforcement of the criminal laws of the state, and is accordingly a proper defendant.

The various motions to dismiss are each overruled.

II. Motion for Summary Judgment

The challenged section of the Indiana abortion statute is clearly unconstitutional. The decisions in *Roe* and *Doe* expressly state that regulation by the State as to the facility in which an abortion is to be performed is the type of regulation which can only occur after the "compelling point" or end of the first trimester:

> "It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Roe* at 163.

The Supreme Court expressly prohibited such regulation prior to the compelling point:

> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State,

> that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effected by an abortion free of interference by the State." *Id.*

In *Doe,* the Supreme Court also expressly held "that the hospital requirement of Georgia law, because it fails to exclude the first trimester of pregnancy . . . is also invalid." 410 U.S. at 195. Accordingly, the Court of Appeals for this circuit has declared invalid regulations promulgated by the Chicago Board of Health which sought to regulate abortion facilities during the first trimester of pregnancy. *Friendship Medical Center, Ltd. v. Chicago Board of Health, supra.*

There are no disputed questions of fact. The case presents simply a question of law, as to the constitutionality of the challenged section of statute. That question having been resolved in favor of plaintiffs, they are entitled to summary judgment in accordance therewith, granting their prayer for a declaratory judgment and permanent injunction.

Dated this 15th day of June, 1976.

/s/ LUTHER M. SWYGERT

Luther M. Swygert, Judge
United States Court of Appeals
For the Seventh Circuit

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge
United States District Court

/s/ JAMES E. NOLAND

James E. Noland, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT D. ARNOLD, M.D.,
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NEIL R. STRICKLAND, M.D.,
IRVING ROSENBAUM, M.D.,
PAUL L. GUISE, M.D.,
WALTER L. OWENS, M.D.,

Plaintiffs,

vs. NO. IP 74-4-C

THEODORE L. SENDAK,
Attorney General of Indiana,
JAMES F. KELLEY, Prosecuting
Attorney of Marion County, Indiana,
BARRY S. BROWN, Prosecuting
Attorney of Monroe County, Indiana,

Defendants.

JUDGMENT

The three-judge court having this date filed its memorandum of decision granting plaintiffs' motion for summary judgment herein, which memorandum is as follows:

(H.I.)

it is therefore

CONSIDERED, DECLARED, AND ADUDGED that Section 2(a)(1) of Public Law No. 322, Acts of the Indiana General Assembly 1973, I.C. 1971, 35-1-58.5-2(a)(1) is unconstituional and void.

It is further CONSIDERED, ADJUDGED AND DECREED that the defendants, Theodore L. Sendak, as Attorney General of Indiana, James F. Kelley, as Prosecuting Attorney of Marion County, Indiana, and Barry S. Brown, as Prosecuting Attorney of Monroe County, Indiana, and their respective servants, agents, attorneys, employees and successors in such offices be, and they are hereby permanently enjoined from executing or enforcing, or threatening to execute or enforce said section of statute.

It is further CONSIDERED AND ADJUDGED that plaintiffs recover their costs herein.

Dated this 15th day of June, 1976.

/s/ LUTHER M. SWYGERT
Luther M. Swygert, Judge
United States Court of Appeals
For the Seventh Circuit

/s/ S. HUGH DILLIN
S. Hugh Dillin, Judge
United States District Court

/s/ JAMES E. NOLAND
James E. Noland, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Filed U.S. District Court Indianapolis Division
Aug. 11, 3:13 P.M., 1976
Southern District of Indiana Arthur J. Beck Clerk

ROBERT D. ARNOLD, M.D., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL NO. IP 74-4-C
	)	
THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Defendant THEODORE L. SENDAK, Attorney General of Indiana, by Darrel K. Diamond, Assistant Attorney General, hereby gives notice that he hereby appeals to the United States Supreme Court, pursuant to 28 U.S.C. §§ 1253 and 2101 (b), from the judgment of this Court of June 15, 1975, declaring an Indiana statute, IC 35-1 58.5-2 (a) (1), to be unconstitutional and enjoining the enforcement of such statute.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

/s/ DARREL K. DIAMOND

Darrel K. Diamond
Assistant Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4725

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Appeal From The United States District Court
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MOTION TO DISMISS OR AFFIRM

SIGMUND J. BECK
Bamberger & Feibleman
500 Union Federal Building
Indianapolis, Indiana 46204
Telephone: (317) 639-5151

EDWARD W. HARRIS, III
Sommer, Barnard, Freiberger & Scopelitis
815 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (317) 639-3454

D. ROBERT WEBSTER
Ice, Miller, Donadio & Ryan
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
Telephone: (317) 635-1213

RONALD E. ELBERGER
Bose, McKinney & Evans
1100 First Federal Building
Indianapolis, Indiana 46204
Telephone: (317) 637-5353

Attorneys for Appellees

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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THEODORE L. SENDAK,
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Appellees.

Appeal From The United States District Court
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MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the appeal has not been taken in time and that the questions presented are so unsubstantial as not to need further argument.

I.

JURISDICTION

Judgment of the District Court together with the Memorandum of Decision was entered on June 15, 1976. The appellant docketed the case on September 23, 1976, more than ninety (90) days since the entry of judgment. The time for docketing the case has not been extended by a Justice of this Court. (Rule 13 of this Court).

It appears accordingly that appellant's appeal is out of time and should be denied.*

II.

FRIVOLITY OF APPEAL

Appellant sets forth the proposition that the entry of Summary Judgment was improper in that no affidavits supported the complaint and that the supposed issue of fact relates to the standing of the plaintiffs to bring the action and the possibility of the lack of a real case or controversy.

The Judgment herein rendered invalid that portion of the Indiana abortion statute which required a physician to perform the abortion in a hospital or licensed health facility in the first trimester of pregnancy. Appellants have not denied that the plaintiffs are doctors but would infer that this is the fact in issue.

To recognize the spuriousness of the argument it should be noted that the parties to this suit were the identical parties in an action in the same District Court in which

*The Court might find this case the appropriate vehicle to set forth standards for waiving docketing requirements as suggested by Justice Douglas in his dissent in *State Board of Election Commissioners* v. *Evers*, 405 U.S. 1001 (1972).

Judgment was rendered on March 5, 1973 declaring that the laws in Indiana pertaining to abortions, in force at that time, were unconstitutional. The Indiana abortion statute was thereafter revised and amended by the Indiana General Assembly on April 24, 1973. Plaintiffs filed motion in the previous action (U.S. District Court, Southern District of Indiana, No. IP 70-C-217) requesting leave to file supplemental complaint challenging the new Indiana abortion statute found at Indiana Code § 35-1-58.5 (Acts 1973, P.L. 322). The Court entered its order on October 8, 1973 denying the motion of the plaintiffs to file the supplemental complaint without prejudice. The plaintiffs thereupon filed the within action on January 2, 1974. It would appear that the standing of the instant plaintiffs and the nature of the controversy should be apparent to all parties. The District Court may take judicial notice of its own decisions.

The lack of standing and case or controversy argument is effectively disposed of by *Doe* v. *Bolton*, 410 U.S. 179 (1973).

In addition, plaintiffs' standing to sue and the presence of a case or controversy is clear from the allegations in paragraph 11 of plaintiffs' complaint, which defendants did not attempt to controvert, that:

> "Each of the above plaintiffs, acting in his professional capacity as a registered and licensed physician and surgeon in the State of Indiana, is hindered, deterred, and threatened and his practice of medicine is seriously impaired by the existence, actual or threatened enforcement, effect, application and impact of the challenged statutory provisions. The interference by the State into abortions by qualified physicians during the first trimester prevents the plaintiffs and other qualified Indiana physicians from practicing medicine according to the highest professional standards."

The additional argument of the appellant attempts to distinguish the issue presented from that of *Doe* v. *Bolton (supra)* in that the Indiana law requires that the abortion be performed in a hospital or licensed health facility, whereas the Georgia statute in *Doe* required that it be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. The difference might be reasonable if the Indiana statute did not mandate the use of the facility in the first trimester. The statute thus does not relate reasonably to the preservation and protection of health as set down in *Roe* v. *Wade*, 410 U.S. 113 (1973).

III.

CONCLUSION

Appellees respectfully submit that the appeal is out of time, no cause has been shown for permitting the same, the questions presented are so unsubstantial as not to need further argument. Therefore the Appellees respectfully move the Court to dismiss the appeal or in the alternative to affirm the judgment entered in the cause by the United States District Court for the Southern District of Indiana.

Respectfully submitted,

SIGMUND J. BECK
EDWARD W. HARRIS, III
D. ROBERT WEBSTER
RONALD E. ELBERGER
Attorney for Appellees